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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92062860
Party	Defendant Dr. Tom Miles
Correspondence Address	DR TOM MILES 20 LIBERTY BLVD MALVERN, PA 19355 UNITED STATES
Submission	Motion to Dismiss - Rule 12(b)
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Date	01/30/2016
Attachments	motion to dismiss petition to cancel 12(b), 92062860.pdf(150385 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

International IP Holdings, LLC

Petitioner,

v.

Tom Miles

Registrant,

For the wordmark: REAL ENERGY (IC 029)

In the matter of Trademark Registration No. 4,534664

Publication Date: October 15th, 2013

Cancellation Proceeding: 92062860

MOTION TO DISMISS PETITION TO CANCEL

In accordance with *Feb. R. Civ. P. 12(b)*, Registrant, acting pro se, moves to dismiss International IP Holding's Petition to Cancel filed on December 15th, 2015.

Background

On December 15th, 2015, Petitioner claimed two grounds for its Petition to Cancel (as stated on the ESTTA cover page), 1.) The term and registered mark, REAL ENERGY, is **Merely Descriptive, 2e(1)**. 2.) The term and registered mark, REAL ENERGY, is **Deceptively Misdescriptive, 2e(1)**. Both claims of Petitioner were clearly improperly pleaded. These claims lack any foundation in fact or in law, and petitioner fails to allege sufficient facts to raise

the requisite plausibility or materiality. Any additional relevant claims contained in the Petition, if there are any, are invalid. Inasmuch as Opposer did not include any headers to separate or delineate the claims within the complaint, the Board should presume that the only grounds relied upon by Opposer are those grounds listed on the ESTTA cover sheet. See *PPG Indus. Inc. v. Guardian Indus. Corp.*, 73 USPQ2d 1926, 1928 (TTAB 2005) (content of ESTTA cover sheet is integral component and read in conjunction with complaint); and *O.C. Seacrets Inc. v. Hotelplan Italia S.p.A.*, 95 USPQ2d 1327 (TTAB 2010) (Board will not parse an asserted ground to see if elements might go to state a separate ground).

1.) Merely Descriptive

As taken from the Petition to Cancel, paragraph 5: *“The REAL ENERGY mark is either merely descriptive or deceptively misdescriptive when used with the goods identified in Application ‘644.’”* and also from paragraph 9: *“Registration ‘664 is not registrable per Section 2(e)(1) of the Trademark Act as it is a merely informational and descriptive phrase that would ordinarily be used in business or in the particular industry.”*

Petitioner’s allegations that the subject mark is **merely descriptive** or informational are conclusory and are not supported by other allegations of factual matter. Petitioner’s reference to its and third-parties’ use of the mark is not sufficient to allege that the mark is merely descriptive. “A complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face’” (Iqbal, quoting Twombly, 550 U.S. at 570); it is essential for a plaintiff to allege “enough factual matter ... to suggest that [a claim is plausible]” and “raise a right to relief above the speculative level” (Totes-Isotoner Corp., 594 F.3d at 1354). Petitioner failed to allege either how the subject mark denotes an ingredient, quality,

characteristic, function, feature, purpose, or use of Applicant's goods, or what that ingredient, quality, characteristic, etc. is.

2.) Deceptively Misdescriptive

As taken from the Petition to Cancel, paragraph 10: *“Alternatively, Registration ‘644 is misdescriptive under Section 2(e)(1) in that it does not provide “real energy” as consumers understand the phrase.”*

In regard to Petitioner's allegations that the mark REAL ENERGY is **deceptively misdescriptive**, Petitioner must sufficiently allege that the subject mark REAL ENERGY immediately conveys an idea about the goods, but that idea, though plausible, is false. See *In re Woodward & Lothrop Inc.*, 4 USPQ2d 1412 (TTAB 1987). The Petition to Cancel does not include any allegations to support (or otherwise explain) Petitioner's conclusory statements that the mark is deceptively misdescriptive. That is, Petitioner failed to allege any facts as to how the subject mark immediately conveys an idea about the goods in the application (i.e., what the idea, ingredient, quality, characteristic, etc. is), whether that idea is plausible (i.e., if anyone would believe it), and, if so, how or why that idea is false.

WHEREFORE, In addition to IIPH's improper pleading of the only two grounds of this Petition (as stated on the ESTTA cover page), this action, rather than having any legal merits, represents nothing more than retaliatory action and misdirected trademark law. To add insult to injury, it is respectfully submitted that the Board consider that Petitioner is routinely using this forum as a tool to eliminate fair competition in the marketplace, which would represent an abuse of the Trademark Trial and Appeals Board's valuable resources. Hence, Registrant prays that the

Petition to Cancel Registrant's Registration No. 4,534664 be dismissed with prejudice and further apply whatever fair, just, and equitable relief this Honorable Board deems appropriate.

Respectfully submitted Pro Se,

Date: January 30, 2016

By Registrant: /Thos. I. Miles/

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CERTIFICATE OF SERVICE

I hereby certify that on January 30, 2016, the foregoing was served upon Petitioner by first class mail:

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By: /Thos. I Miles/

Date: January 30, 2016

Registrant, Tom Miles